77-1030

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

OLINKRAFT, INC.,
PETITIONER

V.

STATE OF LOUISIANA,
THROUGH THE DEPARTMENT OF HIGHWAYS,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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VS.

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THROUGH THE DEPARTMENT OF HIGHWAYS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The Petition of OLINKRAFT, INC. with respect represents:

1.

OPINIONS IN THE COURTS BELOW

Petitioner desires a Writ of Certiorari so that this Court may review the decision of the Supreme Court of the State of Louisiana, New Orleans, Louisiana, reported in 350 So.2d 865, a copy of which is appended hereto as "Appendix I." This decision on rehearing affirmed the decision of the Court of Appeal of Louisiana, Second Circuit, Shreveport, Louisiana, reported in 333 So.2d 721, upholding the judgment of the Third Judicial District Court of Louisiana, Farmerville, Louisiana. A copy of the Court of Appeal's opinion and the judgment of the District Court are appended hereto as "Appendix II" and"Appendix III", respectively.

2.

GROUNDS FOR INVOKING JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are: Petitioner contends that Louisiana Revised Statutes, Title 48:441-460, as amended (Louisiana's "quick-taking statute"; Appendix IV hereto) is violative of Petitioner's rights under the Fourteenth Amendment to the Constitution of the United States in that as applied to the facts of this case it authorizes

and constitutes a taking of private property by Respondent without due process of law.

3.

DATE OF JUDGMENT SOUGHT TO BE REVIEWED

The date of the judgment of the Supreme Court of Louisiana sought to be reviewed is September 19, 1977 (on rehearing). The Supreme Court of Louisiana denied Petitioner's timely application for second rehearing on October 21, 1977, and this Petition for Certiorari is filed within ninety (90) days of that date.

4.

STATUTE CONFERRING JURISDICTION

The jurisdiction to review the judgment in question by Writ of Certiorari is conferred upon this Honorable Court by Title 28, U.S.C. Sec. 1257 (3).

5.

QUESTION PRESENTED

The question presented for review is:

Whether the taking of Petitioner's property in full ownership under the provisions of Louisiana's quick-taking statute, rather than the expropriation of a servitude upon said property, violates the Fourteenth Amendment of the Constitution of the United States as a taking of private property by Respondent without due process of law?

PROVISIONS OF CONSTITUTION AND STATUTES

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

The quick-taking statute of the State of Louisiana involved is Louisiana Revised Statute, Title 48:441-460, as amended. The complete text of this statute is set forth as "Appendix IV" hereto in accordance with the rules of this Court.

STATEMENT OF THE CASE

The State of Louisiana, acting through the Department of Highways, brought suit against Olinkraft, Inc. under Louisiana's quick-taking statute (Appendix IV hereto) to expropriate parcels of Olinkraft's property in Union Parish, Louisiana, for highway and bridge approach purposes. The State alleged that the property taken was required in full ownership subject to a mineral reservation.

Respondent obtained an Ex Parte Order of Expropriation of the property in the Third Judicial District Court for the Parish of Union by filing pleadings alleging that the property was required for a public purpose and by depositing the alleged value of the property taken into the Registry of the Court.

On September 29, 1975, Petitioner filed a Motion to Dismiss and to Vacate the Order of Expropriation in the District Court urging the following grounds (among others) for dismissal:

> "3. . . . (a) That Sections 441-460 of Title 48 of the Revised Statutes of 1950, inclusive, as amended and reenacted, are unconstitutional

in that they violate the due process provisions of the Louisiana Constitution of 1974 and the United States Constitution;

(b) That the taking of the property in full ownership, rather than a servitude of right of way, is not for a public purpose nor in the public interest . . ."

On December 18, 1975, the District Court rendered judgment denying Olinkraft's Motion to Dismiss. (See Appendix IV hereto for copy of judgment.)

Olinkraft then perfected an appeal of the District Court judgment to the Louisiana Second Circuit Court of Appeal, stating in its brief that the following issues (among others) were presented for review:

"1. Do the provisions of L.R.S. 48:441-460 violate Section 4 of Louisiana's Constitution of 1974 as well as the 5th and 14th Amendments of the United States Constitution, in denying due process and permitting property to be expropriated by or order rendered ex parte, without notice or opportunity of the owner to be heard?

"2. In the alternative, does the expropriation here of the property in full ownership, rather than obtaining a servitude thereon, constitute expropriating property for a public purpose?"

In its opinion, the Louisiana Second Circuit stated that the issues presented for review included:

"1. (Whether the 'quick-taking' statute, LSA-R.S. 48:441-460 is in violation of §4 of the Louisiana Constitution of 1974 and the 5th and 14th Amendments of the US Constitution in denying due process and permitting private property to be expropriated by ex parte order prior to judicial hearing.

"2. (Alternatively, is the expropriation of property in full ownership rather than a servitude for a right of way within the requirement that the taking be for a public purpose."

The Court of Appeal then held that the Louisiana quick-taking procedure did not offend the due process clause of the Fourteenth Amendment.

Olinkraft's timely application for rehearing in the Louisiana Second Circuit having been refused, an Application and Petition for Writ of

Certiorari or Review was made to the Supreme Court of Louisiana, wherein Olinkraft stated the issues to be:

> "1. The provisions of La. R.S. 48:441-460 violate Section 4 of Louisiana's Constitution, in denying due process in permitting property to be expropriated by an order rendered ex parte, without notice or opportunity of the owner to be heard?
>
> "2. In the alternative, does the expropriation here of the property in full ownership, rather than obtaining a servitude thereon, constitute expropriating property for a public purpose?"

In its original brief on said writ application, Olinkraft further argued the constitutionality of the Louisiana quick-taking statute under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In its original opinion, the Supreme Court of Louisiana held that the Louisiana quick-taking statute meets the due process requirements of the Fourteenth Amendment, but that the taking of the property in full ownership was invalid as a taking in excess of the property necessary for public (highway) purposes. On rehearing, the Supreme Court of

Louisiana reversed its original decision that the taking was not for a public purpose. (The opinions of the Supreme Court of Louisiana on original hearing and rehearing are set out in full in Appendix I hereto.)

8.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The facts of this case raise a constitutional question of great importance: May a State in the exercise of its power of eminent domain take an estate which is admittedly in excess of that which is necessary for the public purpose giving rise to the expropriation without violating the due process clause of the Fourteenth Amendment to the Constitution of the United States?

This Court has shown justifiable restraint and has accorded much deference to the decisions of state legislatures and courts as to the public or private nature of a particular use within the context of a state expropriation proceeding. Cincinnati vs. Vester, 33 F.2d 242, affirmed 281 U.S. 439, 74 L.Ed. 950, 50 S.Ct. 360 (1930). However, the taking of private property for a nonpublic use is a denial of due process of law even though the taking is accompanied by full compensation to the owner (Madisonville Traction

Company vs. St. Bernard Mineral Company, 196 U.S. 239, 49 L.Ed. 462, 25 S.Ct. 251 (1905), and Vester, supra), and this Court has stated that there can be no reluctance to act on the part of the judiciary when an expropriation constitutes a violation of federal due process. Vester, supra. Further, this Court has refused to rule out the possibility of judicial review of the necessity of a particular taking where a legislative decision is shown to be arbitrary, capricious or in bad faith. United States vs. Carmack, 329 U.S. 230, 67 S.Ct. 232, 91 L.Ed. 209 (1946). That the expropriation is authorized by a state constitution or statute is of no comfort to the expropriating authority since the provisions of the Fourteenth Amendment to the United States Constitution are binding upon every state. Hairston vs. Danville & W. R. Company, 208 U.S. 598, 52 L.Ed. 637, 28 S.Ct. 331 (1908). Thus, the characterization of a particular use as public or private is ultimately for judicial determination. Rindge Company vs. Los Angeles County, 262 U.S. 700, 67 L.Ed. 1186, 43 S.Ct. 689 (1923); Sears vs. Akron, 246 U.S. 242, 62 L.Ed. 688, 38 S.Ct. 245 (1918); and Hairston, supra. In making that determination, the United States Supreme Court is not bound by the characterizations of state legislatures and judiciaries. Vester, supra.

Where a statute authorizing condemnation does not prescribe the nature of the estate to be taken, only such interest or estate may be taken by the condemnor as is sufficient to satisfy the purposes of the taking. Staplin vs. Canal Authority, 208 So.2d 853, Fla. App. (1968); Long Island Lighting Co. vs. Empire State Development Corp., 356 NYS 2d 390 (1974); Warm Springs Irrig. Dist. vs. Pacific Live Stock Co., 270 F. 560, 9th Cir. (1921). To the extent that an expropriation includes more property than is necessary for public purposes, the expropriation is not for a public use. Carlsbad vs. Ballard, 71 NM 397, 378 P.2d 814, 6 ALR 3d 293 (1963).

When this excessive exercise of state power in denial of individual constitutional rights is clear (and even admitted, as is the case herein) the duty of this Court to intervene is just as clear. A determination by the Department of Highways that the estate taken is for public use does not preclude this Court's review of that determination, particularly where an error is gross and obvious. Roberts vs. City of New York, 295 U.S. 264, 79 L.Ed. 1429, 55 S.Ct. 689 (1935).

The record establishes that only a servitude of right of way is held by the State on the highway to which the Olinkraft property is to be added

(District Court record; Exhibits D-1 and D-2). As shown by the Resolution of the Highway Board which was annexed to the Department of Highways' original petition, the Department was authorized to take either a servitude or full ownership.[1] Further, the Department of Highways informed Olinkraft prior to expropriation that it would take only a servitude if Olinkraft would donate same; upon Olinkraft's refusal to donate, full ownership of the property was expropriated. These facts are clearly probative of the sufficiency (even as determined by the State) of a servitude of right of way to fulfill the public purpose for which Olinkraft's property was taken. In addition, the Department of Highways has stated on the record that the taking of property in full ownership has become a fixed policy to be applied in all expropriation cases. The reason advanced for the institution of this policy was to facilitate the granting and location of other servitudes (i.e., for electrical transmission lines and water lines) within the boundaries of highways. The arbitrary application of this policy in all cases for purposes admittedly ancillary to highway and bridge construction (the sole purpose for which the Department of Highways was authorized to quick-take

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1. "NOW, THEREFORE, BE IT RESOLVED by the Board of Highways, two-thirds of its members concurring, that it hereby determines and declares it to be necessary and useful to take, by expropriation for highway purposes and in the manner provided by law, in servitude or in full ownership, the property and property rights not otherwise acquired which are needed for the proper construction of each of the said projects." (Emphasis supplied)

under the statute in question) is such a gross disregard for private property rights as to constitute a denial by the State of due process of law.

This Court is not restricted in its examination of the issues before it to abstract constitutional principles; rather, an examination of the facts and circumstances of a particular case is appropriate to determine whether a state action has resulted in a deprivation of constitutional rights. New York Times vs. Sullivan, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964).

Under Louisiana's system of property law, a landowner whose property is burdened by a servitude of right of way retains valuable ownership rights therein: such a servitude is extinguished by ten years of

nonuse by the grantee,[2] thereby re-establishing full ownership in the landowner/grantor; the landowner may utilize the property burdened by such a servitude in any manner not inconsistent with the rights of the servitude holder; and the landowner's property is not divided into noncontiguous tracts by such a servitude. However, when land is taken in full ownership for highway purposes, the landowner is deprived of these ownership rights. This deprivation has particularly onerous consequences under the following provisions of Louisiana mineral law: A single mineral servitude may not be created on noncontiguous tracts of land;[3] and, mineral servitudes are extinguished by ten years of nonuse.[4] Therefore, an owner whose property is divided by a taking in full ownership must establish operations or production on both sides of the highway to prevent extinguishment of the servitude. Petitioner submits that it is violative of fundamental due process to so deprive an owner of such valuable ownership rights and to so burden his remaining land by a taking which is arbitrary and admittedly excessive.

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2. La.C.C., Art. 789, (1870).

3. La.R.S., Title 31:73, (1975).

4. La.R.S., Title 31:27(1), (1975).

For these reasons, Petitioner prays that a Writ of Certiorari issue to the Supreme Court of Louisiana to review the decision of that court in this case.

Respectfully submitted,

(Signed) CLYDE R. BROWN
CLYDE R. BROWN

and

SIGNED JAMES H. NAPPER II
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Attorneys for Petitioner,
Olinkraft, Inc.

PROOF OF SERVICE

I, CLYDE R. BROWN, one of the attorneys for Olinkraft, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of January, 1978, I served copies of the foregoing Petition for Certiorari on State of Louisiana, through the Department of Highways, Respondent, by mailing a copy thereof, postage prepaid, to Bernard L. Malone, Jr., Jerry F. Davis, D. Ross Banister and William W. Irwin, Jr., P. O. Box 44245, Capitol Station, Baton Rouge, Louisiana 70804, its attorneys of record.

(Signed) CLYDE R. BROWN
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of

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APPENDIX I

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF HIGHWAYS

V.

OLINKRAFT, INC.

NO. 58451

SUPREME COURT OF LOUISIANA

MAY 16, 1977

On Rehearing Sept. 19, 1977

Rehearing Denied Oct. 21, 1977

Writ of Review to the
Court of Appeal,
Second Circuit,
Parish of Union

SUMMERS, Justice.

On September 16, 1975 the Department of Highways instituted this expropriation suit by a declaration of taking-- quick taking-- procedure to acquire in full ownership three small parcels of property belonging to the defendant, Olinkraft, Inc. The taking is in connection with the Bayou Deloutre Bridge Project in Union Parish involving the construct-

ion of a new bridge and realignment of the highway to provide the necessary approaches.

Based upon the Department's petition and the annexed certificates, the trial judge signed an ex parte order of expropriation dated September 16, 1975, reciting that upon deposit of its estimated value the full ownership of the property, subject to a reservation of minerals in favor of Olinkraft, would be considered expropriated and taken for highway purposes.

Olinkraft filed a timely motion to dismiss alleging 1) that Sections 441 to 460, inclusive, of Title 48 of the Revised Statutes, upon which the expropriation suit is based, are unconstitutional in that they violate the due process provision of the State and Federal Constitutions; 2) the taking of the property in full ownership, rather than a servitude of right of way, was not for a public purpose or in the public interest; 3) alternatively, if it is held that taking in full ownership is a discretionary function of the Department, the taking is an abuse of that discretion; and 4) Olinkraft is entitled to a judicial determination of its rights under the State and Federal Constitutions.

A trial of the motion to dismiss resulted in a rejection of Olinkraft's contentions and the judgment was

affirmed on appeal to the Second Circuit. 333 So.2d 721. Certiorari was granted on Olinkraft's application. 338 So.2d 292.

Constitutionality.

Section 2 of Article I of the Louisiana Constitution of 1921 declares that "private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid." (emphasis added). Section 15 of Article IV of that Constitution prohibited the divesting of vested rights "unless for purposes of public utility, and for just and adequate compensation previously paid." (emphasis added). These requirements of payment before taking of private property are embodiments of a principle long established in this State. Article 497 of the Civil Code required previous indemnity before one could be deprived of his property for a purpose of public utility. See also Police Jury of Jefferson v. D'Hemecourt, 7 Rob. 509 (La. 1844) and State through the Department of Highways v. Phares, 245 La. 534; 159 So.2d 144 (1964).

Due process requirements mandated a judicial determination of the necessity for the taking and whether the payment offered was just and adequate compensation before the Department of Highways could enter upon and take possession of property needed for highway purposes. La.Const. art.

I, §6 (1921). Delays occasioned by these requirements undoubtedly retarded highway improvements resulting in the enactment of a constitutional amendment creating an exception to the restraints imposed by the due process and prior payment clauses of the Constitution. This amendment[1] authorized a "taking of property for highway purposes by orders rendered ex parte in expropriation suits prior to judgment therein" with provisions for payment by a deposit in the registry of court of an estimated just and adequate compensation.

To implement this exception to the constitutional limitations on its power of expropriations, and to delegate the soverign right of expropriation vested in it, the Legislature enacted Sections 441 to 460, inclusive, of Title 48 of the Revised Statutes in 1954. This legislation provided for expropriation by a "Declaration of Taking" permitting the taking, including possession and title, of property for highway purposes prior to judgment in the trial court.

Then in 1974, effective January 1, 1975, Louisiana adopted a new constitution. Section 4 of

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1. La. Const. art. VI, §19.1.

Article I is the provision pertinent to the contention that Sections 441 through 460 of Title 48 of the Revised Statutes is unconstitutional. Section 4 provides:

> "Every person has the right to acquire, control, own, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power. Property shall not be taken or damaged by the State or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate property, except for a public and necessary purpose and with just compensation paid to the owner and, in such proceedings, the issue of whether the purpose is public and necessary shall be a judicial question. In all expropriations, any party shall have the right to trial by jury to

determine compensation and the owner shall be compensated to the full extent of the loss. No business enterprise or any of its assets shall be taken for the purpose of halting competition with government enterprises, except that municipalities may expropriate utilities within their jurisdiction. Personal effects, other than contraband, shall never be taken. The provisions of this Section shall not apply to appropriation of property necessary for levee and levee drainage purposes."

The Legislature amended and reenacted the declaration of taking or quick taking statutes effective January 1, 1975. The major changes resulting from these amendments were additions of several sections (La. Rev.Stat. 48:451.1 - 451.23) detailing the trial procedure for suits by landowners questioning the State's expropriation. However, the amendments retained the substance of those sections which are pertinent to the issues before the Court in this case, viz:

Sec. 441: Where the department cannot amicably acquire property needed for highway purposes, the department, or its successors, may acquire same by expropriation.

In any suit for the expropriation of property, including both corporeal property and servitudes, the department, or its successors, may acquire the property prior to judgment in the trial court in the manner provided in this Part. (emphasis added).

Sec. 444: The petition shall conclude with a prayer that the property be declared taken for highway purposes. Upon presentation of the petition, the court shall issue an order directing that the amount of the estimate be deposited in the registry of Court and declaring that the property described in the petition has been taken for highway purposes at the time of the deposit. (emphasis added).

Sec. 447: Any defendant desiring to contest the validity of the taking on the ground that the property was not expropriated for a public purpose may

file a motion to dismiss the suit within ten days after the date on which the notice was served on him . . .

Failure to file the motion within the time provided constitutes a waiver of all defenses to the suit except claims for compensation. (emphasis added).

Sec. 460: The plaintiff shall not be divested by court order of any title acquired under these provisions except where such court finds that the property was not taken for a public purpose. In the event of such findings, the court shall enter such judgment as is necessary to compensate the defendant for the period during which the property was in the possession of the plaintiff and to recover for the plaintiff any award paid.

It is seen from Section 4 of Article I of the Constitution of 1974 that prior payment of just compensation is no longer a constitutional requirement to be fulfilled before the Department may take possession. The pertinent language reads: "Property shall not be taken or dam-

aged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit." It is now permitted, therefore, as it was in Section 19.1 of Article IV of the 1921 Constitution, to expropriate if there is a deposit of the just compensation into court for the owner's benefit.

The plan of the quick taking statutes requires that just compensation be "paid to the owner or into court for his benefit" before the taking, the provisions of Section 447 of Title 48 give the owner an opportunity to contest the validity of the taking within ten days, and the provisions of Section 460 of Title 48 authorize the court to set aside the taking and compensate the owner if the taking is not found to be for a public purpose.

In this context the initial expropriation under the quick taking statutes "prior to judgment in the trial court" is in a sense only temporary. La.Rev.Stat. 48:441. The divestiture is contingent. In the meantime the owner is compensated by being paid or the estimate is deposited into the registry of court to his account. Id. Sec. 444. The owner is then given the opportunity to contest the validity of the taking. Id. Sec. 447. And, should this court decide that the taking was not for a public purpose, the department is divested

of title and the owner is compensated for the period during which the property was in the Department's possession. Id. Sec. 460. In the interim the owner has the use of the property's estimated value.

Judgment in the trial court is not rendered until the owner is heard and after inquiry and a trial. If the owner is satisfied with the compensation offered, makes no motion to dismiss, and accepts the compensation, the bargain is struck and the Department's title to the property or rights taken is complete.

Considered in the light of the public interest in expediting the construction of highways, the protections against abuse afforded the owner of private property by the quick taking statutes, and the presumption of constitutionality attached to Legislative enactments, these are reasonable statutory implementations of the constitutional authority to expropriate private property and the procedure prescribed does not deny due process. U.S. Const. Amend. 5, 14; La. Const. art. I, §2 (1974).

Judicial review and necessity for taking.

In State of Louisiana, Through the Department of Highways v. Jeanerette Lumber & Shingle Co.,Ltd., Nos. 58,437 and 58,438,the decision in State Through the Department of

Highways v. Guidry, 241 La. 516, 124 So.2d 531 (1960) was reversed. The Guidry decision had stood for the proposition that when the Department expropriates property under the quick taking statute courts may only determine the adequacy of the compensation and whether the property was taken for a public purpose. On this premise the Guidry court held that it was within the Department's discretion to determine whether there was a necessity to expropriate full ownership or merely a servitude affecting the land. The implication from the Guidry decision was that courts could not review the Department's determination.

In Jeanerette we held to the contrary saying, in effect, that courts could always inquire into the validity of the taking. Jeanerette found that the rights to a permanent servitude of right of way were not for a necessary highway purpose and the order of expropriation was modified accordingly.

The issue is the same in the instant case, and this Court will determine from this record whether the full ownership of the property or a servitude is required by the Department for the highway purposes to which the property is to be put.

At the outset it is noted that only a right of way or servitude was acquired for the existing highway to which the three small parcels involved in this case will be added.

Negotiations prior to filing suit disclosed that the Department would accept a servitude if Olinkraft would donate the right of way. When Olinkraft refused to donate the servitude, this suit was filed and full ownership is demanded. Also the certificate of the Board of Highways authorizes the taking of either a servitude or full ownership. This evidence convincingly demonstrates that a servitude would have sufficed to serve the highway purposes for which this property is being taken.

But the Department asserts that full ownership is required in order that the Department may control the right of way corridor and grant permits to electric utilities, pipe lines and the like on and across its rights of way. At times electricity is needed to light the rights of way or provide power for electric pumps at rest areas and power for other unnamed facilities. On occasions in the past, it is said, the Department's right to grant permits has been questioned when only a servitude of right of way was acquired. However, the Court's attention has been called to Section 381 of Title 48 of the Revised Statutes which authorizes the director of the Department, when not inconsistent with the purposes of state highways, to issue permits for the use and occupancy of the rights of way of state highways. Inasmuch as the cited Section 381 gives the Department the right to grant permits whether

its right of way is in full ownership or a servitude, its argument for full ownership instead of a servitude is unimpressive.

In addition to the foregoing, the Department's evidence is to the effect that appraisers value a servitude at eighty percent of the full ownership value, thus affecting a twenty percent saving for the Department when servitudes are acquired instead of full ownership. Although this is the theory, the witness observed that it was not always the result in practice. In any event, there is no disadvantage to a servitude pricewise; in fact, a saving is more likely.

On this record there is no showing which would support a taking of full ownership instead of a servitude. Thus, no highway purpose is served by insisting on the more onerous taking. The owner's right of property is not to be unduly violated when the highway purpose can be served with a modified taking.

For the reasons assigned, the judgments appealed from are reversed and set aside and the order of expropriation is modified to vest in the Department a servitude of right of way to the property expropriated in lieu of full ownership.

SANDERS, C. J., dissents with written reasons.

TATE, J., dissents for reasons assigned in State Through Dept. of Highways v. Jeanerette Lumber & Shingle Co., La., 350 So.2d 847 (Docket Nos. 58,437 & 48,438).

CALOGERO, J., dissents for reasons assigned by the Chief Justice.

SANDERS, Chief Justice (dissenting).

This Court granted writs in this expropriation proceeding to consider the applicability of State, Through the Department of Highways v. Guidry, 240 La. 516, 224 So.2d 531 (1960) to our present "quick-taking" statute, LSA-R.S. 48:441 et seq., La. 338 So.2d 292 (1976). Guidry held that our former "quick-taking" statute precluded judicial review of the necessity for such taking. In State, Through the Department of Highways v. Jeanerette Lumber and Shingle Company, Ltd., La., 350 So.2d 847 (Nos. 58,437 and 58,438, 1977), a majority of this Court has today overruled Guidry and the numerous decisions that have followed it. I have recorded my dissent.

In this case, Olinkraft attacks the constitutionality of our present "quick-taking" statute, asserting that the statute offends federal and state due process guarantees.[1] It buttresses the claim with the arguments that the landowner is not afforded an opportunity to be heard prior to the expropriation, and that the absence of an express 1974 constitutional authorization for

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1. U.S. Const. Amends. V and XIV; La. Const. Art. 1, § 2 (1974).

"quick-taking prohibits use of this expropriation procedure.

In State, Through the Department of Highways v. Macaluso, 235 La. 1019, 106 So.2d 455 (1958), this Court held our former "quick-taking" statute constitutional. As the amendments to the "quick-taking" statute still provide for expropriation prior to a hearing, Macaluso controls. Therein we stated:

> "Respondents' final contention is that Act 107 of 1954 offends federal due process requirements. This argument has little merit. As the United States Supreme Court stated in Bragg v. Weaver, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135, in upholding a State enactment similarily /sic, similar/ to the present Louisiana statute permitting an ex parte taking with immediate possession for highway purposes without any hearing whatsoever provided as to the necessity of the taking although with an eventual full judicial hearing (if desired) upon the property owner's claim for compensation, 251 U.S. 58-59, 62, 40 S. Ct. 63:
>
> "'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as

> the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.
>
> "'But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard.***'" (Footnote and citations omitted.)

Inasmuch as the "quick-taking" statute provides for the landowner to be heard on the issue of compensation, the present statute is consistent with federal due process standards.

For the same reasons stated above, I believe this expropriation procedure consistent with state due process requirements. See State, Through the Department of Highways v. Jackson Brewing Company, La. App., 146 So.2d 504 (1962); State, Through the Department of Highways v. Higgins, La. App., 135 So.2d 306 (1961).

Olinkraft next contends that, under the 1974 state constitution, the Legislature no longer has authority to enact a "quick-taking"

expropriation statute. While the 1921 Louisiana Constitution explicitly provided for the "quick-taking" procedure[2], Article 1, §4 of the 1974 Constitution contains the following broad language:

> "Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.
>
> "Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent

2. La. Const. Art. 6, §19.1 (1921)

> of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction. Personal effects, other than contraband, shall never be taken." (Emphasis supplied.)

The language is sufficiently broad to authorize the Legislature to adopt a "quick-taking" statute. The Due Process Clause of the 1921 Constitution provided that private property "shall not be taken or damaged except for public purposes and after just and adequate compensation is paid." La. Const. Art. 1, §2 (1921) (Emphasis supplied.) See State, Through the Sabine River Authority v. Phares, 245 La. 534, 159 So.2d 144 (1963). In an obvious reference to the "quick-taking" procedure, the 1974 provision reduces the limitation to "with just compensation paid to the owner or into court for his benefit." See State of Louisiana, Constitutional Convention of 1973. Verbatim Transcripts. 39 volumes (1973-1974). (Hereinafter cited as Proceedings.) XV Proceedings (46th day, September 13) 54 and 61; XII Proceedings (39th day, August 30) 8; Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La.L. Rev.1.

Moreover, assuming arguendo that Article 1, Section 4 is interpreted to contain no specific authorization to the Legislature, the convention's General Guideline No. 1 of the Manual on Style and Drafting correctly formulates the controlling rule as follows:

> "The general rule of state constitutional interpretation is: The provisions of a state constitution are limitations on the power of the people exercised through the legislature; what is not prohibited by the constitution is permitted. Therefore, the legislature is empowered to enact any law not prohibited by the constitution; it is unnecessary to specify, for example: The legislature has the power to enact laws providing for punishment for crime. In the absence of constitutional prohibition, the legislature has that power."

1 Official Journal of the Proceedings of the Constitutional Convention of 1973, 769 (1973).

In a perceptive commentary on the 1974 Constitution, Professor Hargrave noted:

> "Though Louisiana courts have accepted and applied the principle that a state legislature possesses plenary power to do anything not prohibited by the constitution even absent a grant of power, the fact that the 1921 constitution contained so many grants of power, often grants coupled with explicit or implicit limitations, resulted in the general principle being applied less often than it might otherwise have been. The 1974 constitution, deliberately short, intentionally concise, and knowingly avoiding grants of power, will require application of the principle more often. The convention used the principle as its basic starting point, and a narrow construction of legislative power under the document would thwart its purpose of giving more flexibility to the legislature." (Footnote omitted.)

The Work of the Louisiana Appellate Courts for the 1974-1975 Term - Louisiana Constitutional Law, 36 La. L.Rev. 533.

In Hainkel v. Henry, La., 313 So.2d 577 (1975), we stated:

> "Thus, in the absence of a particular constitutional provision that limits the power of the legislature to act in the respects assailed, a legislative action cannot be invalidated as contrary to the state's constitution."

Therefore, the constitutional attack upon LSA-R.S. 48:441 et seq. is without merit.

In Olinkraft's final contentions it complains of the extent of the property right taken by the State. It alleges that the expropriation of its property in full ownership, rather than a servitude of right of way, is not a taking for a public purpose; and alternatively, that the Department of Highways abused its discretion by taking its land in full ownership.

Apparently, the majority assumes that since it has overruled State, Through the Department of Highways v. Guidry, supra, the necessity of the taking is a proper issue for judicial determination in

the present case. Such an assumption is unwarranted. As I noted in my dissent in State, Through the Department of Highways v. Jeanerette Lumber and Shingle Company, Ltd., supra, the overruling was based upon the words "highway purposes" found in Section 19.1 of Article 6 of the Louisiana Constitution of 1921. That provision is no longer extant. Under the 1974 Constitution, as I have already noted, the Legislature has full authority to enact a "quick-taking" statute. The words "highway purposes" do not appear in Article 1, §4 of the 1974 Constitution.

In Act No. 30 of the Extraordinary Session of 1974, the Legislature amended and re-enacted the "quick-taking" statute, effective January 1, 1975. The major change made by these amendments was the addition of several statutes (LSA-R.S. 48:451.1 - 451-23) detailing the trial procedure for suits by landowners questioning the State's expropriation. However, the amendments retained the substance of former LSA-R.S. 48:447 and 460. These sections, as amended, read in pertinent part:

> LSA-R.S. 48:447
>
> "Any defendant desiring to contest the validity of the taking on the ground that the property was not expro-

priated for a public purpose may file a motion to dismiss the suit within ten days after the date on which the notice was served on him."

LSA-R.S. 48:460:

"The plaintiff shall not be divested by court order of any title acquired under these provisions except where such court finds that the property was not taken for a public purpose." (Emphasis supplied).

These sections limit divestiture to the instance in which the property was not taken for a public purpose. Therefore, courts are precluded from reviewing the necessity of the taking.

I conclude that the present statute bars judicial inquiry into the landowner's complaints concerning the extent of the property interest expropriated and the necessity for such expropriation.

For the reasons assigned, I respectfully dissent.

ON REHEARING

DENNIS, Justice.

We granted a rehearing in this case to reconsider our original decision relating to judicial review

of the necessity and extent of the taking in ex parte highway expropriations under the Louisiana Constitution of 1974 and La.R.S. 48:441 et seq. as reenacted, Act 30 of Ex.Sess. 1974.

The Department of Highways, seeking to take additional property in full ownership along both sides of its servitude over defendant's land in Union Parish for the purposes of widening the roadway and constructing a highway bridge, proceeded under the newly reenacted quick-taking statute, Act 30 of Ex.Sess. 1974 (La.R.S. 48:441 et seq.), and obtained an expropriation order from the district court. Defendand subsequently appeared and filed a motion to vacate or modify the order contending that the quick-taking statute is unconstitutional, that the expropriation was not for a public purpose, and that the Department abused its discretion in expropriating the full ownership of the property, rather than a servitude. The district court refused to vacate or modify the expropriation order and the court of appeal affirmed its judgment. Thereafter, writs were granted here and upon original hearing, we reversed and modified the expropriation order so as to grant the Department a servitude over the property instead of full ownership.

(1) As to the first issue raised by the defendant, we need merely re-affirm our unanimous decision upon initial hearing. Louisiana's present quick-taking highway expropriation statute, La.R.S. 48:441 et seq. (Act 30 of Ex.Sess. 1974) is inoffensive to the Louisiana Constitution of 1974 and the United States Constitution for the reasons ably stated by Justice Summers in his original majority opinion, by Chief Justice Sanders in his dissenting opinion, and by Judge Price in his court of appeal opinion, 333 So.2d 721 (La.App.2d Cir. 1976).

Writs were granted in this case to consider the applicability of State, Through the Department of Highways v. Guidry, 240 La. 516, 124 So.2d 531 (1960) to the present quick-taking statute. 338 So.2d 292 (La. 1976). Guidry held that our former quick-taking statute precluded judicial review of the necessity for such a taking. In State, Through the Department of Highways v. Jeanerette Lumber & Shingle Company, Ltd., 350 So.2d 847, Nos. 58,437 and 58,438 (La. 1977), we re-affirmed but clarified our holding in Guidry, stating:

> "In summary, therefore, when the Highway Department expropriates property pursuant to Article VI, § 19.1, La. Const. of 1921, and Act 107 of 1954, there are three questions which the

> courts may determine: (1) whether the property was taken for a highway purpose; (2) whether the expropriating agency acted abritrarily, capriciously or in bad faith in determining the necessity of the taking; and (3) the adequacy of the compensation. ***" 350 So.2d 847, Nos. 58,437 and 58,438 (La. 1977).

The present quick-taking statute was enacted by the Legislature after the adoption of the Louisiana Constitution of 1974. The former quick-taking act which we interpreted in the Jeanerette case was enacted pursuant to a grant of authority set forth in the Louisiana Constitution of 1921. However, the two quick-taking statutes are identical in every respect here pertinent, and we find no change in the provisions of the present constitution which requires that we draw a different inference from the same statutory language.

(2) The Louisiana Constitution of 1921, Article VI, § 19.1 authorized ex parte expropriations for "highway purposes" only, whereas the Louisiana Constitution of 1974, Article I, § 4 merely requires that expropriations by the State or its political subdivisions be for "public purposes". As a result of the new terminology, the Legislature may authorize quick-takings for any public purpose and need

no longer limit such legislation to takings for highway purposes. Otherwise, however, there appears to have been no intention to change the legal standards for expropriations by public agencies. See, State of Louisiana, Constitutional Convention of 1973, Verbatim Transcripts, Vol. XII, pp. 6-54, 56-120 (39th day, August 30, 1973); Vol. XIV, pp. 34-68 (46th day, Sept. 13, 1973); Hargrave, Declaration of Rights, La.L.Rev. 1, 16 (1974).

(3) Because the Legislature did not alter the provisions of the quick-taking statute pertinent to this case, and because the present constitution does not require a different interpretation of those provisions, the principles inferred from the same statutory language in the Jeanerette case are applicable here. Consequently, when the Department of Highways or its successor expropriates property pursuant to Article I, § 4, La.Const. of 1974, and Act 30, Ex.Sess. 1974, there are three questions which the courts may determine: (1) whether the property was taken for a highway purpose; (2) whether the expropriating agency acted arbitrarily, capriciously or in bad faith in determining the necessity of the taking, and (3) the adequacy of the compensation.

(4,5) Considering the remaining contentions of the defendant in light of these principles we conclude, first, that the property clearly was

taken for a highway purpose because it was expropriated for the construction of a highway bridge and the widening of the approaching roadway. Defendant argues that the taking in full ownership could not be for a highway or even a public purpose because only a servitude was necessary for the construction project. This argument, however, does not properly relate to the purpose of the taking but is an attempt to raise the question of its necessity, an issue which courts may not consider except for the purpose of determining whether the expropriating agency acted arbitrarily, capriciously or in bad faith in deciding that the taking was necessary. State, Through the Department of Highways v. Jeanerette Lumber & Shingle Co., Ltd., 350 So.2d 847, Nos. 58,437 and 58,438 (La. 1977); State, Through the Department of Highways v. Guidry, 240 La. 516, 124 So.2d 531 (1960).

(6) In an effort to discharge its heavy burden of proving that the Department acted arbitrarily in determining that it was necessary to expropriate the property in full ownership, the defendant introduced evidence that the Board of Highways' resolution authorizing the taking declared that the property could be expropriated in servitude **or** in fee, that before the taking the state owned only a sertivude along the roadway at the site of the expropriation, that it would be possible

to accomplish the construction of the contemplated physical improvements without acquisition of full ownership, that the policy of taking a fee instead of a servitude in right of way expropriations had been a uniform policy of the Department for several years, and that after the issuance of the expropriation order the Department's attorney proposed to defendant through its counsel that the state would dismiss the expropriation proceedings if defendant would donate to it a servitude and refund the deposit.

The Department contended that full ownership rather than a servitude was necessary to the project. Its evidence indicated that the policy of acquiring full ownership had been adopted to give the Department complete control of the use of land within its rights of way corridors. This policy apparently evolved because of the difficulty the Department encountered over the years in locating or relocating public utility improvements within the right of way when it did not own the fee. The evidence indicated it is often necessary to move pipes and cables out of the way of roadway construction and frequently desirable to bring water, electrical and other utility services on to highway improvements such as bridges and roadside parks. According to one witness, some utility improvements, such as underground lines, are often discovered unexpectedly where public records give no

indication of their existence. The Department's ancillary policy of attempting to settle an expropriation suit by offering to accept a donation of a servitude was based on the experience of its employees that sufficient funds would normally be saved through a free acquisition to defray the expenses of locating or relocating public utilities within the highway right of way. The record further suggests that the Board of Highways' resolutions routinely authorize the acquisition of either a fee or a servitude in order to facilitate donations and settlements.

Defendant asserts that the Department's determination of necessity was arbitrary or capricious because it was based on a fixed policy used to govern every expropriation and that the policy is not reasonable because under La.R.S. 48:381, the director of the Highway Department is authorized to issue permits for the use and occupancy of the rights of way of state highways for installations such as underground and overhead cables, conduits and pipes. The statute provides that such installation must be made upon the condition that the owner shall, at no cost to the Department, remove or relocate the facility whenever necessary for highway purposes. Consequently, defendant argues, the Department does not need to own the fee in order to effect cost free installation, removal or relocation of such facilities. The Department

points out, however, that the jurisprudence holds that this statute does not give the Department, when it owns only a servitude for highway purposes, the authority to grant permission to another party for a different use. See, Koch v. Louisiana Power & Light Company, 298 So.2d 124 (La.App. 1st Cir. 1974), writ denied 302 So.2d 17 (La. 1974); Louisiana Power & Light Company v. Dileo, 79 So.2d 150 (La. App. 1st Cir. 1955). Moreover, the Department's argument suggests, even if defendant has correctly interpreted the statute, that La.R.S. 48:381 is applicable only to installations made pursuant to a permit for use and occupancy issued by the Director. Accordingly, the statute provides no authority for removal or relocation of facilities placed on land prior to the Department's acquisition of a servitude across it, and no inducement to installation of new facilities on a right of way by a utility owner who is unwilling to accept the conditions attached to a permit. Without attempting to definitively decide the abstract legal questions raised, we conclude there is sufficient basis in law and practicality to justify the Department's concerns about taking servitudes for highway rights of way and to provide a rational basis for its policy and decision to expropriate the property in full ownership. Hence the expropriating body did not act arbitrarily, capriciously or in bad faith and, therefore, we may not

substitute our judgment for the Department's on this question.

For the foregoing reasons, the judgment of the court of appeal is affirmed at relator's cost.

SANDERS, C. J., concurs.

SUMMERS, J., dissents and adheres to the Court's original opinion.

DIXON, J., dissents.

REHEARING REFUSED:

OCTOBER 21, 1977

NO. 58,451

STATE OF LOUISIANA,
DEPARTMENT OF HIGHWAYS,

V.

OLINKRAFT, INC.

(On Rehearing)

SUMMERS AND DIXON, J. J., are of the opinion that a rehearing should be granted.

CLERK OF
SUPREME COURT OF
LOUISIANA

APPENDIX II

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

MAY 24, 1976

NO. 12,907

STATE OF LOUISIANA,
DEPARTMENT OF HIGHWAYS,
Plaintiff-Appellee

V.

OLINKRAFT, INC.,
Defendant-Appellant

Appealed from the
Third Judicial District Court for the
Parish of Union, Louisiana

Honorable Fred W. Jones, Jr., Judge

Before: BOLIN, PRICE, MARVIN, JJ.

By Price, J.

In this proceeding the State of Louisiana through the Department of Highways seeks to expropriate under the "quick-taking" statute a portion of the property belonging to Olin-

kraft, Inc. for the purpose of constructing a bridge and realigning a segment of Louisiana Highway 2 in Union Parish. An order of expropriation was signed allowing the expropriation in full ownership of defendant's property upon the deposit into the registry of the court of the estimated just compensation in accord with LSA-R.S. 48:441-460, the "quick-taking" statute. Defendant timely filed a motion to dismiss and vacate the order of expropriation on the following allegations:

> (A) That Sections 441 to 460 of Title 48 of the Revised Statutes of 1950, inclusive as amended and reenacted, are unconstitutional in that they violate the due process provisions of the Louisiana Constitution of 1974 and the United States Constitution;
>
> (B) That the taking of property in full ownership, rather than a servitude of right of way, is not for a public purpose nor in the public interest;
>
> (C) In the alternative and in the event it should be held that the taking in full ownership is a discretionary function of the plaintiff, that plaintiff has abused its discretion in taking in full ownership rather than a servitude of right of way; and

> (D) That Mover is entitled to an adversary hearing and judicial determination of its rights under the Louisiana Constitution of 1974 and the United States Constitution.

After a hearing, the trial court rendered judgment rejecting defendant's motion to dismiss.

On this devolutive appeal by defendant, the issues for review as formulated by the assignments of errors in brief are:

> 1) Whether the "quick-taking" statute, LSA-R.S. 48:441-460 is in violation of §4 of the Louisiana Constitution of 1974 and the 5th and 14th amendments of the U. S. Constitution in denying due process and permitting private property to be expropriated by ex parte order prior to a judicial hearing.
>
> 2) Alternatively, is the expropriation of property in full ownership rather than a servitude for a right-of-way within the requirement that the taking be for a public purpose.
>
> 3) In any event has the Department of Highways abused its discretion in determining the full ownership should be expropriated rather than a servitude.

The question relating to the violation of the 5th and 14th amendments of the U. S. Constitution by the ex parte proceedings of the "quick-taking" statute has been resolved by the decision of the Supreme Court in State of Louisiana, Department of Highways v. Mocaluso, 235 La. 1019, 106 So. 2d 455 (1958).

In that decision the Louisiana Supreme Court found the "quick-taking" procedure of the Louisiana expropriation statute not to offend the due process provisions of the U. S. Constitution, relying on Bragg v. Weaver, 251 U. S. 57, 40 S. Ct. 62, 64 L. Ed. 135 (1919), in which the U. S. Supreme Court upheld a state statute similar to the Louisiana expropriation statute. We quote in pertinent part the rationale of the Supreme Court in Bragg as follows:

> "Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment. /Citations omitted/
>
> "But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court, carrying with it a right to have the matter determined upon a full trial. /Citations omitted/ And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal. /Citations omitted/

* * * * * * * *

> "* * * /I/t is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay, the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just. /Citations omitted/"

The remaining issue posed in defendant's first assignment of error is whether the "quick-taking" provisions of LSA-R.S. 48:441-460 as amended by Act 30 of the Extra

Session of 1974, violate §4 of the Louisiana Constitution of 1974.

Defendant contends the absence of a specific permission in the 1974 Constitution for the State to take private property for a highway purpose prior to a judicial hearing, as was provided by the 1948 amendment to the 1921 Constitution, (Article 6 §19.1)[1], precludes the State from using the "quick taking" method. Defendant primarily relies on certain expressions of the Supreme Court in State v. Mocaluso, supra, in support of its position.

Mocaluso did contain language indicating the ex parte taking prior to a judicial hearing would be violative of the due process clause of the State Constitution of 1921 without the specific authority granted by Article 6 §19.1. It should be noted, however, that the provisions of the 1921 Constitution relating to due process differs from that contained in the 1974 Constitution. The prior Constitution in Article 1 §2 provided:

---

1. Article 6 §19.1 of the Louisiana Constitution of 1921, provided as follows:

> "The Legislature shall have authority to authorize the taking of property for highway purposes by orders rendered ex parte in expropriation suits prior to judgment therein provided that provision be made for deposit before such taking with a court officer for the amount of appraisals of the property so taken and damages to which the owner thereof may be entitled, if any, which appraisals may be made in such manner as may be provided by law either before or after institution of suit, and need not be by judicially appointed appraisers."

> "No person shall be deprived of life, liberty, or property except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just compensation is paid."
> /emphasis supplied/

The declaration of rights in Article 1 of the 1974 Constitution (analogous to the Bill of Rights in Article 1 of the 1921 document) contains in addition to the due process declaration of §2, a more explicit delineation of the rights relating to property as follows:

Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction. Personal effect, other than contraband, shall never be taken.
/emphasis supplied/

It is significant that the due process clause of the 1921 Constitution (Article 1 §2) prohibited the taking of private property for public purposes until "after" payment of just compensation. The rights to property enumerated in §4 of Article 1 of the 1974 Constitution permit the taking of private property for public purposes "with just compensation paid the owner or into court for his benefit." We also think the subjection of the right to own property to "reasonable statutory restrictions and the reasonable exercise of the police power" was intended to grant authority for the legislature to permit the taking of property by ex parte order prior to hearing when it appears reasonable. The method of taking provided for in LSA-R.S. 48: 441-460 is in our opinion a reasonable statutory restriction on the right to own property. That this was the intent of the delegates to the constitutional convention in adopting this language in §4 of Article 1 is shown by examination of the discussion and debate on this section as reflected by the official journal of the proceedings of the convention on its 39th day. On at least two occasions, the Supreme Court has made reference to the official proceedings of the constitutional convention in resolving issues relating to interpretation of its provisions. See Gozales v. Xerox Corporation, 320 So. 2d 163, 165, footnote 1, (1975),

and Hainkel v. Henry, 313 So. 2d 577, 580 (1975).

We conclude the "quick taking" provisions of LSA-R.S. 48:441 do not violate the Louisiana Constitution of 1974.

The remaining assignments of error relate to whether the taking of the property in full fee as opposed to a servitude is within the requirement that the taking be for a public purpose and whether the Department of Highways was arbitrary in determining the need of full ownership under the circumstances presented in this case. Defendant contends a servitude of right-of-way is all that is necessary for the proposed construction and that it is not in the public interest to take from it the full fee ownership of the subject property.

The Supreme Court in the case of State of Louisiana, Department of Highways v. Guidry, 240 La. 516, 124 So. 2d 531 (1960) held the Department of Highways has the discretion to determine whether or not full ownership of expropriated land is to be required. This case apparently remains the law on this issue.

We further find the evidence presented shows the taking in full ownership was for a public purpose and that the Department of Highways was not arbitrary in making such a

determination.

The testimony shows the Department of Highways had adopted in recent years a uniform policy of expropriating in fee rather than acquiring a servitude for highway construction. The principal reason shown for this policy is to allow the Department to have full authority to permit the installation of utilities within the highway right-of-way. This prevents delay in highway construction and is conducive to effective control of the highway corridor. Other benefits are also shown to accrue to the public by having the utilities readily available for lighting and other ancillary highway purposes.

In accord with the foregoing, the judgment appealed is affirmed at appellant's costs.

COURT OF APPEAL
SECOND CIRCUIT
State of Louisiana

Office of the Clerk, Shreveport, Louisiana. July 7, 1976.

As counsel of record in the captioned case, you are hereby notified that the application or applications for rehearing filed by Defendant-Appellant have this day been Refused, en Banc.

State,
Dept. of Highways

versus

Olinkraft, Inc.

Docket No. 12,907

Sincerely,
Harold L. Booth
Clerk of Court

APPENDIX III

STATE OF LOUISIANA,
THROUGH THE DEPARTMENT OF HIGHWAYS

vs.

OLINKRAFT, INC.

No. 21,466

Third Judicial District Court
Parish of Union
State of Louisiana

JONES, Judge

JUDGMENT ON RULE TO DISMISS

This cause came on for trial on November 18, 1975, on a rule directed to plaintiff, State of Louisiana, through the Department of Highways, by defendant, OLINKRAFT, INC., to show cause why plaintiff's suit should not be dismissed. Present in court were: James H. Napper, II, representing OLINKRAFT, IN ., defendant and mover in rule, and Bernard L. Malone, Jr., representing the plaintiff and defendant in rule, State of Louisiana, through the Department of Highways. The Court, after hearing oral argument of counsel and considering the law and evidence to be in favor of plaintiff and against the defendant, for oral reasons assigned:

IT IS ORDERED, ADJUDGED AND DECREED that the motion to dismiss be and same is hereby denied and overruled.

Judgment rendered in open court on this 18th day of November, 1975, at Farmerville, Louisiana.

Judgment read and signed in open court on this 18th day of December, 1975 at Farmerville, Louisiana.

s/Fred W. Jones, Jr.
JUDGE, THIRD JUDICIAL DISTRICT COURT

APPENDIX IV

Louisiana Revised Statutes

Title 48:441-460

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§441. Authority to expropriate and acquisition of property prior to judgment

Where the department cannot amicably acquire property needed for highway purposes, the department, or its successor, may acquire same by expropriation.

In any suit for the expropriation of property, including both corporeal property and servitudes, the department, or its successor, may acquire the property prior to judgment in the trial court in the manner provided in this Part.

§442. Petition for expropriation; place of filing; contents

The rights of expropriation granted by this Part shall be exercised in the following manner:

(1) A petition shall be filed by the plaintiff in the district court of the parish in which the property to be expropriated is situated. However, where the property to be expropriated extends into two or more parishes and the owner of the

property resides in one of them, the petition shall be filed in the district court of the parish where the owner resides, but if the owner does not reside in any one of the parishes into which the property extends, the petition may be filed in any one of the parishes. In all such cases, the court wherein the petition is filed shall have jurisdiction to adjudicate as to all the property involved.

(2) The petition shall contain a statement of the purpose for which the property is to be expropriated, describing the property necessary therefor with a plan of the same, a description of the improvements thereon, if any, and the name of the owner if known.

(3) The petition shall have annexed thereto the following:

(a) A certified copy of a resolution adopted by the board of highways, or its successor, with the concurrence of not less than two-thirds of a quorum present, declaring that the taking is necessary or useful for the purposes of this Part.

(b) A certificate signed by the chief engineer of the department or, in his absence, his principal assistant, declaring that he has fixed the right of way in a manner sufficient in his judgment to provide presently and in the future for the public interest, safety, and convenience.

(c) A certificate signed by the director, chief engineer, road

design engineer, and, if appropriate, bridge design engineer, declaring that the location and design of the proposed improvements are in accordance with the best modern practices adopted in the interest of the safety and convenience of the traveling public. In the absence of any of them, his chief assistant may sign for him.

(d) An itemized statement of the amount of money estimated to be the full extent of the owner's loss for the taking or the damage, or both as the case may be. It shall be signed by those who made the estimate showing the capacity in which they acted and the date on which it was made. The right-of-way officer of the department or, in his absence, his chief assistant, shall signify his approval of the statement on the face thereof.

§443. Appointment of estimators; restrictions in selection

The right-of-way officer shall select two or more persons to make the estimate, but two of them must be right-of-way appraisers or agents who are in the regular employ of the department or licensed realtors who are familiar with land values in the vicinity of the property to be taken.

§444. Prayer of petition; ex parte order of taking

The petition shall conclude with

a prayer that the property be declared taken for highway purposes. Upon presentation of the petition, the court shall issue an order directing that the amount of the estimate be deposited in the registry of the court and declaring that the property described in the petition has been taken for highway purposes at the time of the deposit.

§445. Vesting of title

Upon the deposit of the amount of the estimate in the registry of the court, for the use and benefit of the persons entitled thereto, the clerk shall issue a receipt showing the amount deposited, the date it was deposited, the style and number of the cause, and the description of the property and property rights, as contained in the petition. Upon such deposit, title to the property and the property rights specified in the petition shall vest in the department and the right to just and adequate compensation therefor shall vest in the persons entitled thereto.

§446. Notice to defendant

Upon receipt of the deposit, the clerk of court shall issue a notice to each defendant in the suit, notifying him that the property described in the petition has been expropriated for highway purposes.

This notice, together with a certified copy of the order, the petition, and the clerk's receipt for the deposit, shall be delivered by the clerk to the proper sheriff for service on each defendant in the manner provided for the service of citations.

§447. Contesting validity of taking; waiver of defenses

Any defendant desiring to contest the validity of the taking on the ground that the property was not expropriated for a public purpose may file a motion to dismiss the suit within ten days after the date on which the notice was served on him. He shall certify thereon that a copy thereof has been served personally or by mail on either the plaintiff or its attorney of record in the suit. This motion shall be tried contradictorily with the plaintiff to the judge alone and shall be decided prior to fixing the case for trial.

Failure to file the motion within the time provided constitutes a waiver of all defenses to the suit except claims for compensation.

§448. Right of possession; limitation by court

If there are no buildings located wholly or partially upon the property described in the petition, the department is entitled to enter

upon and take possession of the property upon the deposit of the estimated compensation.

If any building is located wholly or partially upon the property described in the petition, the court may postpone the right of entry for any period not to exceed thirty days from the date on which the last of any parties defendant was served with the notice. However, the department in its discretion, may request the court to order possession surrendered after a longer delay. The court may fix a reasonable rental to be paid to the department by a defendant in possession of the property for each day he remains in possession after the withdrawal of any part of the amount deposited.

§449. Withdrawal of amount deposited

Upon the application of any party in interest, and upon due notice to all parties, the court may order that the money deposited, or any part thereof, be paid forthwith to the person entitled thereto for or on account of the just and adequate compensation to be awarded in the proceedings.

The court may make such orders as shall be just and equitable to direct the payments of taxes, encumbrances and other charges out of the money deposited.

§450. Defendant's answer; requirements; delay for filing

A. Where an entire lot, block or tract of land is expropriated, any defendant may apply for a trial to determine the measure of compensation to which he is entitled, provided:

(1) He files an answer within ninety days from the date he is served with the notice;

(2) His answer sets forth the amount he claims;

(3) His answer has a certificate thereon showing that a copy thereof has been served personally or by mail on all parties to the suit who have not joined in the answer.

B. Where a portion of a lot, block or tract of land is expropriated, any defendant may apply for a trial to determine the measure of compensation to which he is entitled, provided:

(1) He files an answer within one year from the date he is notified in writing by the department that it has finally accepted the construction of the highway project for which the property was expropriated; provided, he may file his answer prior to the date he is notified by the department;

(2) His answer sets forth the amount he claims, including the value of each parcel expropriated and the amount he claims as damages to the remainder of his property;

(3) His damage claim is reasonably itemized;

(4) His answer has a certificate thereon showing that a copy thereof has been served personally or by mail on all parties to the suit who have not joined in the answer.

§451. Fixing for trial; notice

After answer is filed either party may cause the matter to be fixed for trial in accordance with procedures established by the district courts not inconsistent with this Part, and the court shall issue an order fixing the time of the trial of the suit. The clerk of court shall thereupon issue to all parties a notice of the time fixed for the trial. This notice shall be served at least thirty days before the time fixed for the trial and in the manner provided by law for the service of citations.

§451.1 Right to trial by jury

In an expropriation proceeding pursuant to this Part any party has the right to demand a trial by jury to determine just compensation.

§451.2 Time limit for demanding jury trial; waiver of demand for jury trial; limitations

A. A defendant may demand jury trial in his answer or by motion filed within the delays provided for the filing of his answer.

B. The department may demand jury trial by motion filed no later than fifteen days after an answer filed by a defendant.

C. For purposes of this Section, answers filed by attorneys appointed to represent absent or unknown defendants shall not cause these delays to begin to run, unless that answer indicates that the appointed attorney has been retained or employed by the owner to assert and prosecute a claim in his behalf.

D. Once any party has timely demanded a jury trial, that demand is effective against and binding upon all parties to the suit, and cannot thereafter be waived without the consent of all parties. With the consent of all parties, a demand for jury trial may be waived at any time prior to the swearing of the jury.

§451.3 Deposit of security for jury costs

The court shall require any defendant, other than a political subdivision of the state of Louisiana who demands a jury trial, to post a bond or other security as may be required in ordinary similar jury cases, but the amount of the bond or other security shall not exceed five hundred dollars. The department shall not be required to post any such bond or security.

§451.4 Trial of less than all issues; stipulation

The trial of all issues for which jury trial has been requested shall be by jury unless the parties stipulate that the jury trial shall be as to certain issues only, but in all cases there shall be but one trial.

§451.5 Qualification and exemption of jurors

The qualifications and exemptions of jurors and the method of choosing and summoning the general venire in jury cases are provided by special laws.

§451.6 Procedure in general

In cases to be tried by jury, six jurors summoned in accordance with law shall be chosen by lot to try the case. The method of calling and drawing by lot shall be at the discretion of the court.

§451.7 Swearing of juror before examination

Before being examined every prospective juror shall be sworn to answer truthfully such questions as may be propounded to him.

§451.8 Examination of juror

The court shall permit the parties or their attorneys to conduct the examination of a prospective juror and may itself conduct an examination, which shall be limited to ascertaining the qualifications of the juror.

§451.9 Peremptory challenges

Each side is allowed three peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed two. Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court before the examination of the voir dire.

§451.10 Challenges for cause

A juror may be challenged for cause based upon any of the following:

(1) When the juror lacks a qualification required by law;

(2) When the juror has formed an opinion in the case or is not otherwise impartial, the cause of his bias being immaterial;

(3) When the relations, whether by blood, marriage, employment,

friendship, or enmity, between the juror and any party or his attorney are such that it must be reasonably believed that they would influence the juror in coming to a verdict;

(4) When the juror served on a previous jury which tried the same case or one arising out of the same facts;

(5) When the juror refuses to answer a question on the voir dire examination on the ground that his answer might tend to incriminate him.

§451.11 Time for peremptory challenge

After the entire jury has been accepted and sworn, no party has the right to challenge peremptorily.

§451.12 Challenging or excusing jurors after acceptance

Although the entire jury may have been accepted and sworn, up to the beginning of the taking of evidence, a juror may be challenged for cause by either side or be excused either for cause or by consent of both sides, and the panel completed in the ordinary course.

§451.13 Swearing of jurors; selection of foreman

When the jury has been accepted by all parties, the jurors shall be sworn to try the case in a just and impartial manner, to the best of their judgment, and to render a ver-

used against the alternate jurors.

§451.15 Time for charging the jury; recordation of charge.

After the trial of the case and the presentation of all the evidence and arguments. the court shall charge the jury in accordance with law. This charge shall be in writing or recorded in the same manner as testimony taken in the case.

§451.16 Contents of charge to jury

In his charge to the jury, the judge shall instruct the jurors on the law applicable to the cause submitted to them, but he shall not recapitulate or comment upon the evidence in such manner as to exercise any influence upon their decision as to the facts.

§451.17 Instruction to jury; objections

A. At the close of the evidence or at an earlier time during the trial as the court reasonably directs, a party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.

B. A party may not assign as error the giving or the failure to give an instruction unless he objects thereto before the jury re-

dict according to the law and the evidence. When the jury has retired, the jurors shall select a foreman to preside over them and sign the verdict which they may render.

§451.14 Alternate jurors

The court may direct that one or two jurors in addition to the regular panel be called and empanelled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict. If one or two alternate jurors are called, each side shall have an equal number of peremptory challenges. The court shall determine how many challenges shall be allowed and shall allocate them among the parties on each side. The additional peremptory challenges may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be

tires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

§451.18 Taking evidence to jury room

In reaching a verdict, the jurors should rely upon their memories, and when they retire to the jury room to deliberate, they shall not be allowed access to any written evidence or to any notes of the testimony of any witness, with the following exceptions:

(1) The judge may permit the jury to take into the jury room a concise summary of the property affected containing only the following: the size of the owner's affected property immediately before the expropriation; the size of the area expropriated; the size of the owner's remaining affected property immediately after the expropriation; a list of any improvements expropriated, and a list of any improvements not taken but which may have been affected by the expropriation, provided said summary has been admitted into evidence.

(2) The judge may permit the jury to take into the jury room a statement of the relevant value conclusions reached by each expert witness, if applicable, provided said statement has been admitted into evidence. Such statements shall not

contain any corroborative or persuasive material and should consist solely of the name of the witness, the effective date of the value estimate, and a recitation of the pertinent value conclusions, and unit value conclusions, if applicable, testified to by the witness.

(3) The jury may take with them into the jury room any object or document received in evidence which requires a physical examination to enable them to arrive at a just conclusion.

(4) The parties may stipulate that appraisal reports or summaries of appraisal reports testified to by expert witnesses may be taken into the jury room.

(5) The jury shall be permitted to take into the jury room an itemized statement of the loss the owner alleges he has suffered if testimony has been presented as to each item of loss, and if such statement has been admitted into evidence.

§451.19 Number required for verdict

In order to reach any verdict, five of the jurors trying the case must concur therein.

§451.20 Special verdicts

With the consent of all parties, the court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that

event, the court may submit to the jury written questions susceptible of categorical or other brief answer, or may submit written forms of the several findings which might properly be made under the pleadings and evidence, or may use any other appropriate method of submitting the issues and requiring the written findings thereon. The court shall give to the jury such explanation and instruction concerning the matter submitted as may be necessary to enable the jury to make its findings upon each issue. If the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to trial by jury of the issue omitted, unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding, or, if it fails to do so, it shall be presumed to have made a finding in accord with the judgment on the special verdict.

§451.21 General verdict accompanied by answer to interrogatories; objection

A. (1) The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to

enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

(2) When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers.

(3) When the answers are consistent with each other, but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict, or may order a new trial.

(4) When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment, but may return the jury for further consideration of its answers or may order a new trial.

B. At any time prior to argument, a party may file written requests that the court submit to the jury written interrogatories as set forth in this Section. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.

A party may not assign as error the submission or failure to submit

a written interrogatory unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

§451.22 Remittitur or additur as alternative to new trial; reformation of verdict

If the trial court is of the opinion that the verdict is so excessive or inadequate that a new trial should be granted for that reason only, it may indicate to the party or his attorney the time within which he may enter a remittitur or additur. This remittitur or additur is to be entered only with the consent of the plaintiff or the defendant, as the case may be, as an alternative to a new trial, and is to be entered only if the amount of the excess or inadequacy of the verdict or judgment can be separately and fairly ascertained. If a remittitur or additur is entered, then the court shall reform the jury verdict or judgment in accordance therewith.

§451.23 New trial on showing of misconduct by jury

A new trial shall be granted if it is proved that the jury was bribed or has behaved so improperly that impartial justice has not been done.

§452. Laches by defendant forfeits defense; judgment

If a defendant fails to file his answer timely, the department shall thereafter give affirmative notice, by certified mail, to such defendant of the pendency of the proceedings. If an answer is not filed within ten days after the date on which such notice is mailed, the court shall render final judgment fixing just compensation in the amount deposited into the registry of court and awarding that sum to the defendant.

§452.1 Abandonment in trial and appellate court

A. An owner's claim for an increase in the compensation is abandoned when he fails to take any step in the prosecution of that claim for a period of five years. This provision shall be operative without formal order, but on ex parte motion of the department the trial court shall render final judgment fixing just compensation in the amount deposited in the registry of the court and awarding that sum to the defendant and dismissing with prejudice any claim for any increase in compensation.

B. An appeal is abandoned when the parties fail to take any step in its prosecution or disposition for the period provided in the rules of the appellate court, which shall be not less than one year.

§453. Measure of compensation; burden of proof

A. The measure of compensation for the property expropriated is determined as of the time the estimated compensation was deposited into the registry of the court, without considering any change in value caused by the proposed improvement for which the property is taken.

B. The measure of damages, if any, to the defendant's remaining property is determined on a basis of immediately before and immediately after the taking, taking into consideration the effects of the completion of the project in the manner proposed or planned.

C. The owner shall be compensated to the full extent of his loss.

D. The defendant shall present his evidence of value first.

E. Reasonable attorney fees may be awarded by the court if the amount of the compensation deposited in the registry of the court is less than the amount of compensation awarded in the judgment. Such attorney fees in no event shall exceed 25% of the difference between the award and the amount deposited in the registry of the court.

§454. Trial according to Code of Civil Procedure and the general expropriation laws

Except as provided in this Part, these suits are tried in accordance

with the provisions of the Code of Civil Procedure and general expropriation laws.

§455. Judgment to provide interest

The judgment rendered therein shall include, as part of the just compensation awarded, legal interest on the amount finally awarded as of the date title vests in the plaintiff to the date of payment, but interest shall not be allowed on so much thereof as has been deposited in the registry of the court.

§456. Judgment as to difference awarded; payment of judgment

A. If the amount finally awarded exceeds the amount so deposited, the court shall enter judgment against the department and in favor of the persons entitled thereto for the amount of the deficiency. The final judgment, together with legal interest thereon, shall be paid within sixty days after becoming final. Thereafter, upon application by the owner or owners, the trial court shall issue a writ of mandamus to enforce payment.

B. If the amount finally awarded is less than the amount so deposited, the court shall enter judgment in favor of the department and against the proper parties for the amount of the excess, together with legal interest from the date of withdrawal of the deposit to the

date of payment.

§456.1 Estimate less than deposit

The plaintiff shall not be required to amend its petition in order to obtain judgment in an amount less than that originally deposited into the registry of the court, but the plaintiff may not introduce evidence as to any special benefits unless specially pleaded. If severance damages are pleaded by the defendant, the plaintiff shall have the opportunity to plead special benefits twenty days prior to trial.

§457. Distribution of final award

The court also has the power to make such orders as are just and equitable with respect to distribution of the amount finally awarded.

§458. Grant as additional authority

The right to take possession and title in advance of final judgment, as provided herein, is in addition to any right or authority conferred by the laws of this state under which expropriation proceedings may be conducted, and shall not be construed as abrogating, eliminating, or modifying any such right or authority.

§459. Devolutive appeal; effect of appeal

A devolutive appeal shall lie from expropriation suits tried pursuant to this Part without any additional deposit by the plaintiff, and no appeal from any expropriation suit brought under the provisions of this Part shall operate to prevent or delay the vesting of title in the plaintiff.

§460. Divesting of title

The plaintiff shall not be divested by court order of any title acquired under these provisions except where such court finds that the property was not taken for a public purpose. In the event of such findings, the court shall enter such judgment as is necessary to compensate the defendant for the period during which the property was in the possession of the plaintiff and to recover for the plaintiff any award paid.